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In the Supreme Court of the United States

OCTOBER TERM, 1950

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

FOR THE NORTHERN DISTRICT OF ILLINOIS
ON APPEALS FROM THE UNITED STATES DISTRICT COURT

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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No. 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 18

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the District Court for the Northern District of Illinois (R. 173) is reported in 88 F. Supp. 982. The reports of the Interstate Commerce Commission (R. 16, 75) appear in 270 I. C. C. 591 and 274 I. C. C. 229.

JURISDICTION

The final decree of the three-judge district court was entered on January 12, 1950 (R. 189). The petitions for appeal were presented and allowed on March 7, 1950, and March 10, 1950 (R. 190, 196, 198, 202, 203, 207, 208, 213). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted on May 15, 1950 (R. 460).

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and the Inland Waterways Corporation Act are set forth in the Appendix, *infra*, pp. 52–56.

QUESTIONS PRESENTED

The Interstate Commerce Commission issued an order requiring rail carriers to join connecting barge lines in establishing through routes and joint rail-barge rates computed by deducting specified differentials from corresponding all-rail rates. The principal question presented is:

1. Whether, as appellants contend, a finding that the operating costs of rail-barge service are lower than those of all-rail service is essential to the validity of an order prescribing rate differentials; or whether, as the district court held, such an order is valid when based upon considerations of the value of the respective services to shippers, the willingness of the barge lines to operate at the lower rates and absorb the differentials, the effect of rates upon traffic, and the conditions necessary to the development of a sound and adequate national transportation system.

A subsidiary question is:

2. Whether the order prescribing differentials constitutes an unlawful or unconstitutional discrimination against certain ports and shippers and in favor of New Orleans and other ports on inland waterways.

STATEMENT

These are direct appeals from the judgment of a three-judge district court denying an injunction to restrain enforcement of an order of the Interstate Commerce Commission requiring rail carriers to joint connecting barge lines in establishing through routes and joint rail-barge rates calculated by deducting specified differentials from corresponding all-rail rates between the same origins and destinations.[1]

The three barge lines which are appellees in this proceeding[2] are Inland Waterways Corporation, a government corporation supervised by the Department of Commerce (Federal), Mississippi Valley Barge Line Company (Valley), and American Barge Line Company (American). Among them they handle about 5½ million tons of cargo annually.[3] Federal serves St. Louis, Chicago,

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[1] Appellants in No. 45 are the 26 railroads who instituted this action. The other appellants were intervenors on the side of the plaintiffs in the court below—in No. 46, Galveston Chamber of Commerce and Houston Port and Traffic Bureau; in No. 47, Railroad Commission of Texas; and in No. 48, Savannah Sugar Refining Corporation.

[2] In addition to the United States, the Interstate Commerce Commission, and the three barge lines, appellees include the following other intervenors in support of the Commission's order: Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, Inc., and New Orleans Traffic and Transportation Bureau.

[3] In 1947 Federal carried 2,154,412 tons, Valley carried 2,076,470 tons, and American carried 1,385,666 tons (R. 22–24).

Minneapolis-St. Paul, Omaha, New Orleans, Port Birmingham and intermediate ports. Valley serves Cincinnati, St. Louis, Pittsburgh, and New Orleans, as well as points on the Monongahela River. American operates principally between Pittsburgh and New Orleans. The operations of the two private barge lines have been profitable. Federal has had some profitable periods, but has incurred an average net deficit of $242,431 per year. (R. 20–24.)

Two of the barge lines (Federal and Valley) interchange substantial quantities of freight with connecting rail carriers, although the volume of this type of transportation has decreased in recent years. In the case of Federal the joint traffic has declined from 68 percent of its total tonnage in 1930 to 17 percent in 1947. Fifty-five percent of Valley's traffic was interchanged with railroads in 1941 as against 2 percent in 1947 (R. 20–23).

For nearly 35 years Congress has encouraged the development of inland water transportation and has attempted to promote the interchange of traffic between rail and water carriers. The instant cases represent one aspect of the long struggle over the role to be played by the inland water carriers in our national transportation system. To place the present controversy over rate relationships in perspective it is necessary briefly to trace the history of the struggle that has gone before.

In 1917 freight movement on the Mississippi and Warrior Rivers had virtually ceased (R. 20). But in 1918 Congress, in a war measure primarily designed to provide federal control of the railroads, gave broad authority to the President to expend out of a 500-million-dollar appropriation "such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways * * *." Federal Control Act of 1918, Section 6, 40 Stat. 451, 455.

In the latter part of 1918 the Railroad Administration inaugurated a federal barge service on the Mississippi. Port-to-port barge rates were fixed at 80 percent of the corresponding all-rail rates in order to make the slower, more hazardous and otherwise inferior mode of transportation attractive to shippers (R. 21, 24). When the first joint rail-barge rates were established by the Director General of Railroads in the same year, the 20 percent differential was made applicable to them also, with the barge line receiving the differentially lower division for its portion of the transportation. A limited number of joint rates were established on this basis in 1919 and 1920 (R. 24–25).

When wartime control over railroad transportation facilities was brought to an end by the

Transportation Act of 1920, 41 Stat. 456, it was provided that the experiment in federal barge operation should continue. That Act declared it to be the "policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation" (Section 500, 41 Stat. 499). The water transportation facilities acquired by the United States were turned over to the Secretary of War who was directed (Section 201, 41 Stat. 458):

> [to] operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued * * *.

The directive to the Secretary of War reflects the congressional desire to encourage interchange of traffic between water carriers and rail carriers. The Secretary was (Section 500, 41 Stat. 499):

> to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, * * * *with a view to devising the types most appropriate* for different locations, and *for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail;* * * * to investigate

> the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and *whether the water carriers utilizing such waterways are interchanging traffic with the railroads;* * * *. [Emphasis supplied.]

In 1924 the Government barge operations, which are carried on under the name of "Federal Barge Lines," were turned over to Inland Waterways Corporation, a government corporation created for the purpose, which was to be supervised by the Secretary of War.[4] Inland Waterways Corporation Act, 43 Stat. 360. The Act specifically required the Corporation to continue to carry out the policies laid down in the Transportation Act of 1920. From 1920 to 1927 efforts were made by Federal to establish through routes and joint rates both by voluntary arrangements with rail carriers, and by proceedings before the Commission (R. 25–26).[5] There was much dissatisfaction upon the part of the advocates of water transportation with the results of these efforts (R. 26) and in 1928, in response to this criticism, Congress passed the Denison Act (Act

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[4] In 1939 the corporation was transferred to the Department of Commerce where it has remained (R. 21).

[5] E. g., *United States War Dept.* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, 92 I. C. C. 528.

of May 29, 1928, 45 Stat. 978) which amended the Inland Waterways Corporation Act.

The Denison Act declared it to be the "policy of Congress to continue the transportation services" of federal barge lines until, *inter alia,* "terminal facilities shall have been provided * * * reasonably adequate for joint rail and water service" and "there shall have been *published and filed* * * * such joint tariffs with rail carriers *as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 979). [Emphasis supplied.] The Act required the Commission to grant certificates of public convenience and necessity to barge carriers, and to direct all connecting common carriers and their connections to join with certificated water carriers in through routes and joint rates. The Commission was directed to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service" (45 Stat. 980). The purpose and policy of these provisions have been described by this Court (*United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 462) as follows:

> The provisions * * * with which we are dealing were enacted by Congress in an avowed effort to bring about cooperation on the part of the rail carriers with the water carriers. The report of the House Committee on the proposed legislation (H. Rept. 1537, 70th Cong., 1st Sess., pp. 5–6)

> recites the necessity of overcoming opposition on the part of the rail carriers in respect of through routes, joint rates, etc., without interminable delay and the heavy expense necessary to carry on proceedings before the Interstate Commerce Commission, as a necessary prerequisite to the realization of privately owned transportation service on the inland waterways of the country.

Federal promptly applied under the new Act for an order requiring establishment of additional through routes and joint rates (R. 27). And the Commission directed connecting rail lines to join in such through routes and joint rates except where the rail-barge through routes would result in undue circuity as compared with the all-rail routes (R. 27–28). The Commission, in establishing the basis for the joint rates, adopted the 20 percent differential which had previously been used by Federal except that where the water leg of the route was particularly short as compared to the rail leg, the prescribed differential was reduced to 10 percent (R. 28).[6] Similar orders were subsequently issued with respect to the applications of Valley and American (R. 29).[7]

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[6] *Ex Parte No. 96*, 153 I. C. C. 129. It is evident that if the flat 20 percent differential were applied where the water leg is very short, the results would be incongruous since 20 percent of the entire all-rail rate is deducted from the division received by the barge line.

[7] *Application of Mississippi Valley Barge Line Company*, 167 I. C. C. 41; *Application of American Barge Line Company*, 182 I. C. C. 521.

The final legislative development occurred with the passage of the Transportation Act of 1940, 54 Stat. 898. Under this Act water carriers were brought under the general scheme of regulation of the Interstate Commerce Act. The sections of the Denison Act providing for establishment of joint through rates and rate differentials were replaced by the present Section 307 (d) of the Interstate Commerce Act. This section, in authorizing the establishment of through routes and joint rates by the Commission, requires the Commission to prescribe "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The Transportation Act of 1940 was passed in an atmosphere of suspicion on the part of the advocates of water transportation because of fears that the natural advantages of such transportation might be prejudiced under regulation by a Commission whose previous primary concern had been railroads. See *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 574–76. To allay such general fears, and the specific fear that water carriers would be compelled to raise their rates to such an extent as to eliminate effective competition with railroads, Congress included in such Act a number of provisions which are considered in detail, *infra.*

The Present Proceedings

The proceedings culminating in the present order of the Interstate Commerce Commission began in 1934. The Commission then had pending before it the complaints of certain rail carriers attacking various joint rates prescribed by the Commission under the Denison Act.[8] On October 8, 1934, the Commission on its own motion ordered a general investigation into the reasonableness of existing through routes and joint rates (and the need for additional routes) for rail-barge transportation on the Mississippi and Warrior Rivers and their tributaries, and the reasonableness of the existing minimum differentials between such rates and all-rail rates between the same points. At the same time the Commission reopened certain rate proceedings based upon complaints by Inland Waterways Corporation and its predecessor, the War Department. The rail carriers' complaints and those of Inland Waterways were consolidated with the Commission's general investigation for hearing (R. 18–20, 78–80).

Extensive hearings were held before a commissioner and an examiner, and full argument was had before the Commission itself. On July 7, 1948, the Commission issued a comprehensive report summarizing the voluminous evidence,[9]

[8] Act of May 29, 1928, 45 Stat. 978, repealed in 1940 by the Transportation Act of 1940, 54 Stat. 898, 950.

[9] The record of the proceedings comprises some 16,000 pages of testimony and over 1,500 exhibits.

analyzing the issues presented, and stating its findings and conclusions (R. 16). The Commission found that, generally speaking, almost all points in the United States east of the Rocky Mountains presently have some "two-way rates" [10] available to them and that "from the standpoint of practicality the present structure of joint rates by and large is a fairly satisfactory product of an evolutionary process" (R. 44).

The Commission considered in detail the railroads' objections to the continuation of differentials based upon their assertion that all-rail costs are now lower than rail-barge costs. The Commission rejected the cost studies in support of this assertion, principally on the ground that they related to a period now long past (1933 to 1938), and that substantial changes have occurred with respect to the transportation conditions of both railroads and barge lines since that time (R. 33). The Commission stated that "No useful purpose would be served by reviewing these criticisms [directed against the cost studies] with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail" (R. 33). The Commission then reviewed some of the changes which have occurred

[10] *I. e.*, barge-rail or rail-barge rates. All such joint rates are herein referred to as rail-barge rates.

in the conditions affecting costs of barge operation and concluded that (R. 36)—

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials.

The Commission therefore made no finding as to the present relation of rail-barge costs to all-rail costs.

The Commission reviewed the evidence of shippers indicating that barge transportation is regarded as inferior to rail transportation and will, therefore, be selected by shippers only when there is a rate advantage in doing so (R. 38–39). The Commission said (R. 39):

> The shippers' evidence is chiefly of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense.

In the light of this evidence as to the crucial effect of relative rates, the Commission considered the Congressional policy reflected in the Interstate Commerce Act, the Inland Waterways Act, and the extensive investments made by the United States in barge and terminal facilities for the purpose of developing an efficient and economical rail-barge service. It noted that Congressional encour-

agement of barge transportation had persisted despite the deficit basis upon which Federal Barge Lines had been operating (R. 42):

> In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical.

On the basis of the entire evidence before it the Commission concluded that "joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified" (R. 44). In prescribing the precise differentials to be established the Commission followed, with modifications, the general outline of proposals submitted by the barge lines which were based upon a "relative level of rates necessary to cover full costs, including a return on investment, for the barge portion of the through haul, and *to provide for the rail portion of the through haul revenues as great as if the traffic were transported all rail*" (R. 46; emphasis supplied). In other words, the entire burden of the differentials is to be borne by the barge lines; the connecting rail carriers re-

ceive substantially the same division as for the corresponding portion of all-rail service. And the differentials set forth in the order with respect to "class" rates[11] represent merely an extension, with modifications, of the prevailing pattern established by voluntary action or previously prescribed by the Commission. The differentials are stated in cents per hundred pounds, and are to be deducted from present first class all-rail rates (R. 51, 55–74). Thus subsequent changes in all-rail rates would have no automatic effect on rail-barge rates.

The Commission concluded that, in general, commodity rates should be handled in the same manner as class rates (R. 49), except that no joint rates were prescribed for bulk commodities.[12] It noted, however, that in certain situations exceptions would be desirable with respect to specific commodities, and that adjustments should be made with respect to competitive relationships between ports. Thus it was provided that existing rail-barge rates on sugar should remain undis-

[11] For definitions of "class rates" and the other types of rates used, see *New York* v. *United States*, 331 U. S. 284, 291.

[12] In this connection the Commission stated (R. 50):

"Bulk commodities are largely handled in all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities."

turbed, and it was specified that the Commission would "not require the establishment of barge-and-rail commodity rates from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans" (R. 52).[13]

In view of the complexity of the transportation problems and conditions involved in joint routes, based upon consideration of many factors, the Commission recognized that some modifications in the schedule of prescribed differentials might become necessary as the routes were established. Accordingly, it deferred the issuance of a formal order in the hope that the rail carriers and water carriers could work out voluntarily a system of differentials substantially along the lines suggested in the Commission's report (R. 50–52). The railroads declined to enter such arrangements (R. 75). On June 13, 1949, the Commission issued a supplemental report making slight modifications in its findings, and at the same time issued its order requiring establishment of the specified through routes and joint rates (R. 75, 14).

[13] This proviso was subsequently expanded to cover transportation to or from New Orleans (R. 77).

On September 20, 1949, the present action was instituted by the rail carriers (appellants in No. 45) to enjoin the enforcement of the Commission's order (R. 1). The principal attack upon the legality of the order was based on the fact that the Commission did not find that the rail-barge costs of transportation are lower than corresponding all-rail costs. On January 12, 1950, the court below unanimously upheld the validity of the order as supported by substantial evidence and in accord with statutory authority (R. 173, 189). The opinion of the three-judge district court (by Lindley, J.) answered the principal contention of appellants as follows (R. 178):

> In the instant case, assuming that the operating *costs* of the railroads are less than those of the barge lines, it does not follow that joint barge-rail *rates* should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service. [Emphasis supplied.]

SUMMARY OF ARGUMENT

I

The rate differentials prescribed by the Commission are fully justified under the statutory

standards, and are reasonable. The Commission, in arriving at its expert judgment, has carefully considered all material evidence presented in this voluminous record. It has taken into consideration the value of the respective services to shippers, the effects of rates upon traffic, applicable congressional policy, and all other relevant matters. It has excluded relative transportation costs from consideration because of the inconclusive state of the record with respect to such costs. The attack of appellant-railroads on the order is grounded on the untenable hypothesis that differentials can be justified only if there is an affirmative finding that rail-barge costs of transportation are lower than corresponding all-rail costs. There is no basis in the statute or decisions for such a restrictive rule of rate making.

The argument of appellants that the assertedly lower all-rail costs are an "inherent advantage" of rail transportation which must be reflected in the rate structure cannot be sustained either factually or legally. The Commission and the court below have correctly concluded that the record fails to establish that present all-rail costs are lower than rail-barge costs. And there is no basis in law for the contention that barge rates must be kept artificially high to protect railroads from competition. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282.

II

The rate differentials here prescribed do not create unlawful or unconstitutional discriminations against particular ports or shippers. The attack of the intervening shipper and port interests upon the order falls with the attack of the railroads. Geographical advantages do not constitute an undue preference. Rates otherwise lawful are not either unconstitutional (*Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125) or unlawful as a discrimination (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46) merely because shippers or ports which are favorably situated receive benefits from the rates not available to others.

ARGUMENT

I

THE RATE DIFFERENTIALS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION ARE REASONABLE AND FULLY JUSTIFIED UNDER THE APPLICABLE STATUTORY STANDARDS

Introduction

Appellants are assailing an order of the Interstate Commerce Commission in the exercise of its delegated legislative function in the realm of rate-making which, as this Court has said, "calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to perform." *Missis-*

sippi Valley Barge Co. v. *United States,* 292 U. S. 282, 286. And the particular exercise of expert judgment here has been reviewed and unanimously approved by the three judges sitting in the court below.

Of all rate-making problems, that of adjustment of rate relationships involving competing modes of transportation is among the most difficult. The Transportation Act of 1940 places upon the Commission the responsibility for fixing those relationships in accordance with statutory standards. No single standard is supplied. The National Transportation Policy, *infra,* p. 52, for example, requires "fair and impartial regulation of all modes of transportation," the preservation of the "inherent advantages" of each, the promotion of "safe, adequate, economical and efficient service," and the regulation of rate structures so as to prevent "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." The Commission's efforts are to be directed "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

The Commission in the instant cases has carefully followed the National Transportation Policy and specific statutory standards in determining

that differentials between rail-barge rates and all-rail rates are "justified" (Section 307 (d)) and in prescribing "reasonable" differentials (*ibid.*). See R. 44, 51–52. It has exhaustively considered the entire joint rate structure and its history and all the evidence presented, including that relating to costs, value of the services to shippers, effect of differentials upon traffic, the willingness of the barge lines to accept the lower rates and absorb the differentials, the history of existing structure in practice, and the congressional policy of encouragement of joint rail-barge traffic. The court below rightly concluded (R. 180–181) that "the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject."

Appellants challenge the Commission's bases of decision. They contend, notwithstanding that the Commission did not so find, that the costs of furnishing transportation via all-rail routes are lower than costs over rail-barge routes between the same origins and destinations. With this contention as a premise, appellants argue that the Commission has unlawfully destroyed an "inherent advantage" of rail transportation by permitting the water carriers to charge lower rates than those charged for rail service. These contentions of appellants are met at the outset with

the fact that the Commission did not, and on the basis of this record properly could not, find that all-rail costs are lower than rail-barge costs (*supra*, p. 14). Appellants are therefore forced to argue that differentials cannot lawfully be prescribed here because there is no affirmative finding that rail-barge costs are lower. In other words, appellants must and do argue that lower transportation costs are, as a matter of law, a *sine qua non* to a conclusion that differentials are justified. We propose to demonstrate that there is no basis in the statute, its legislative history, or decided cases, for this arbitrary singling out as controlling of one factor among the many factors which go into rate-making.

It is also essential to a proper appraisal of these cases to recognize that they do not involve the imposition of rates upon rail carriers which those carriers assert are too low, or confiscatory. In fact they do not involve the fixing of rail rates at all. Appellant rail carriers are required by the order here challenged to maintain joint rates with water carriers but they are not required to accept as their division of such rates any less than they receive as a division of the all-rail rates between the same points. What the railroads are objecting to is competition—not the imposition of rates upon them. This fact is made very clear in the railroad-appellants' brief in this Court. They say (Br. 52):

> *It is not the rail lines with which the barge lines connect, but those with which they are competitive, which are here complaining.* The question here is whether a barge-rail route as a whole shall have an unjustified rate advantage over an all-rail route and thereby divert traffic not from the rail carrier with which the barge line connects, but from the rail carrier with which it competes, although in certain instances, the rail carrier with which the barge line competes may be the same carrier with which it connects. [Emphasis supplied.]

Moreover, the differentials prescribed by the Commission are *fixed*, i. e., any changes made in the all-rail rates would not automatically change the rail-barge rates. Although this order is based upon the present level of rail rates, it does not require the rail carriers to maintain that level. The Commission has neither inquired into nor reached any conclusions in the present proceeding with respect to the reasonableness of existing rail rates. It has simply determined that differentials between present all-rail rates and rail-barge rates are justified because, among other things, of the lower value of barge services, and the willingness of the barge lines to furnish such services at a cost to shippers lower than the rail rate. And the differentials which were prescribed were substantially as proposed by the barge lines, and were

designed to establish a level of rates which would compensate the barge lines and provide a return upon investment.

The railroad-appellants seek to establish the principle that, as a matter of law, they are entitled to protection, under the guise of preservation of "inherent advantages", from the legitimate competition of barge lines. The railroads make the curious argument that because they render a "superior" service costing less than the "inferior" service provided by the barge lines, the Interstate Commerce Commission must forbid the barge lines to compete with the railroads by charging a lower rate for barge transportation—in other words, the Commission must keep the rail-barge rates as high as the all-rail rates in order not to deprive the railroads of their "inherent advantages of lower cost of service and superiority of service" (Railroad-appellants' Brief, p. 17). This reduces itself to a contention that the shippers and consuming public should not be allowed to obtain the inferior barge service for less, even though the barge lines are willing to receive less.

The railroads have made no contention in this proceeding that, in view of their lower operating costs, the all-rail rates should be reduced to meet the competitive rail-barge rates. If the railroads were complaining that the Commission's order compelled them to maintain all-rail rates at an

artificial, uneconomic, unduly high level in order to give the barge lines a competitive advantage, the case would assume an entirely different aspect. But the railroads desire to eliminate the differentials not by reducing the all-rail rates but by increasing the rail-barge rates. And that is a crucial fact in this case. As the district court pointed out in its opinion (R. 179): "Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor."

A recent statement of this Court is particularly pertinent in the present case. In *Ayrshire Collieries Corp.* v. *United States,* 335 U. S. 573, 592–593, it was said:

> Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and

competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade* v. *United States,* 314 U. S. 534, 548; *New York* v. *United States,* 331 U. S. 284, 347–349.

A. *The statutory standards*

Section 307 (d) of the Interstate Commerce Act empowers the Commission to establish through routes and joint rates applicable to transportation of property by common carriers by rail and water. And the Commission is required to prescribe "such reasonable differentials as it may find to be justified" between all-rail rates and joint rail-barge rates. The differentials here found by the Commission to be justified were the product of one of the most painstaking investigations ever undertaken by it. In reaching its conclusions the Commission gave full scope both to the specific statutory standards, and to

the broad objectives embodied in the National Transportation Policy.

The specific standards applicable to water carrier rates are found in Sections 307 and 305 of the Act. Section 307 (d), which authorizes joint through rates and reasonable differentials, merely requires that differentials be "justified." Section 307 (f) requires the Commission, in fixing rates for water carriers, to "give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed." The reports of the Commission show clearly that it fully considered such effects. Indeed, one of the principal reasons given by the Commission for the establishment of differentials was that they are essential to the maintenance of rail-barge traffic.

The second requirement of Section 307 (f) is that the Commission shall give consideration to the "need, in the public interest, of adequate and efficient water transportation service at the *lowest cost consistent with the furnishing of such service;* and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service." [Emphasis supplied.] The differentials here prescribed were carefully designed to produce a return to the barge lines sufficient to cover costs, and a return on investment. As previously stated

(pp. 15-16), the differentials fixed by the Commission were substantially as proposed by the barge lines, and have not been challenged by them at any stage of this proceeding. Appellants, in attacking those differentials, are seeking to have water rates established which are higher than the "lowest cost" to the public consistent with the furnishing of efficient water service.

Section 305 (c) contains the usual prohibition against undue preferences and unjust discriminations by water carriers. But it also contains the significant proviso that:

> Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Plainly Congress would not have so provided if it had intended that voluntary rates of water carriers should be tested for validity against corresponding rail rates. If the Commission were to be required to establish water and rail rate relationships on the basis of relative costs, it is obvious that Section 305 (c) would never have been enacted. The provision lays down the rule that water rates are not to be tested for validity

against rail rates.[14] Yet this is precisely what appellants seek to do here with respect to the water portion of rail-barge rates.

The Commission in the instant cases has fully adhered to the requirements of the National Transportation Policy. The objective of the Act is there stated to be one of developing, coordinating, and preserving an adequate national transportation system by water, highway, and rail, as well as other means. To achieve this objective the Policy requires that the Act be administered so as to recognize and preserve the "inherent advantages" of each form of transportation and to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers. The order carries out the mandate[15] of

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[14] Of this provision the House Conferees, in a statement accompanying the conference report on the bill (S. 2009) which became the Transportation Act of 1940, said (86 Cong. Rec. 10172):

"Outside of special provisions designed to protect water carriers the rule of reasonable rates in itself prohibits the imposition of an unreasonably high rate for any carrier for the purpose of aiding a competitive carrier. There is no authority for the contention that the Commission has any right to require a rate higher than is reasonable for the purpose of diverting traffic from any given type of carrier to a competitor."

[15] The Policy is not a mere technical preamble to the Act. It ends with the injunction that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." See 84 Cong. Rec. 9861-6; *McLean Trucking Co.* v. *United States*, 321 U. S.

the Policy by establishing rates which will make it possible for barge lines to continue to perform the useful function of providing inexpensive service to the shippers on through routes. The Commission has refused to sound the death knell of rail-barge transportation by requiring parity of rates for services which, though competitive, are economically unequal.

The duty of the Commission to encourage and preserve interchange traffic among rail and water carriers finds independent statutory support outside of the Interstate Commerce Act. As the Commission pointed out in its Report (R. 40), Section 3 (c) of the Inland Waterways Corporation Act as amended by the Denison Act proclaims it to be the policy of Congress to continue federal operation until, *inter alia,* "there shall have been published and filed * * * such joint tariffs with rail carriers as *shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 978; emphasis supplied). It is obvious that the Commission correctly treated the duty to make such services "generally available" as a duty to make them available upon terms reasonably calculated to be

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67, 82–84; *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U. S. 194, 206; *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616–617; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576.

useful to shippers, *i. e.*, at rates which would make the inferior rail-barge service attractive. At the same time the Commission carefully preserved to the connecting rail carriers the division received by them for the corresponding portion of all-rail service.

Appellants assert that the Commission's order is based solely on its interpretation of congressional policy, and they contend that this is not a proper basis for rate-making (Railroad-Appellants' Br. 23–28). In the first place, as the district court pointed out (R. 179–180), although the Commission relied upon congressional policy, it by no means rested its conclusions exclusively upon such policy. The report of the Commission heavily stresses the value of the respective services to shippers and the effects of differentials upon traffic (R. 39–44). The particular differentials prescribed are based upon the Commission's detailed analysis of all the evidence, including the proposals made by the barge lines and the criticisms of those proposals by the appellants (R. 44–51).

In the second place, the Commission did not look to congressional policy to the exclusion of the substantive statutory provisions. True, it reviewed the history of the development of inland water transportation and the substantial part played by Congress in that development. And it considered that a congressionally sponsored experiment in integrating inland water transporta-

tion with the national transportation system should not be brought to an end by imposing rates upon the water carriers so high as to prevent them from getting any interchange traffic. It would hardly seem that the Commission is to be criticized for weighing these factors. On the contrary, it would be most remiss in its duty if it did not. In interpreting the injunction of the National Transportation Policy to administer the Act to the end of "developing, coordinating, and preserving a national transportation system by water, highway, and rail" the Commission is required to make broad policy judgments which involve estimates of future needs and future developments. Surely, in arriving at an informed judgment the Commission was entitled to consider the reiterated congressional determination that barge line operations and interchange of traffic should be encouraged. The Commission rightly refused to interpret its duty to maintain the "inherent advantages" of rail carriers as an obligation to maintain barge rates at an artificially high level and thus, by relieving the railroads of effective competition, to bring rail-barge traffic to an end.

Appellants rely upon *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, and *United States* v. *New York Central R. R.,* 263 U. S. 603, in support of the contention that congressional policy must not be substituted for applicable statutory

provisions in arriving at rate orders under the Interstate Commerce Act. Those cases are clearly not in point here. As has been shown, the Commission has given the fullest consideration to the applicable statutory standards and to all the evidence offered before it. Certainly these cases do not require that the Commission ignore the expressed indications of the policy of Congress to preserve the ability of water carriers to charge low rates. In *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 574–575, this Court held in the plainest terms that this intention of Congress, reflected in the statute and its legislative history, is a guidepost in the interpretation of the provisions of the Act concerning intercarrier relationships which must not be disregarded.

B *Significance of relative transportation costs*

Appellants point to the National Transportation Policy and legislative history indicating that Congress was concerned with the preservation of the inherent advantages of forms of transportation other than water, and that the Commission is specifically required to provide impartial regulation of all modes of transportation. They argue that the allegedly lower all-rail costs create an "inherent advantage" of which the instant order deprives them, and that the lack of an affirmative finding by the Commission that rail-barge opera-

tions are demonstrably more economical than all-rail operations destroys the validity of the order. Apart from the fact that the order has no direct operation on all-rail rates, and therefore does not prevent the railroads from protecting their competitive position by seeking to lower such rates (see pp. 24–26, *supra,* and 40–47, *infra*), the difficulty with this argument is that it assumes that costs to the *carrier* is the sole and controlling factor in rate-making. The argument seems to ignore entirely the relevance of costs to the shippers and the consuming public.

The pertinent statutory provisions show that far from making relative costs of rail and water carriers the sole or controlling consideration in establishing joint rates, the statute makes no mention of such a consideration. The statutory standards with reference to water rates generally look in the opposite direction. Indeed a proposed provision [16] (in the bill which became the Transportation Act of 1940) which would have *precluded* reduction of rates below costs was deleted

[16] "In order that the public at large may enjoy the benefit and economy afforded by each type of transportation, the Commission shall permit each type of carrier or carriers to reduce rates so long as such rates maintain a compensatory return to the carrier or carriers after taking into consideration overhead and all other elements entering into the cost to the carrier or carriers for the service rendered: *Provided*, That nothing in this paragraph shall be construed so as to affect the long- and short-haul provision of section 4." [86 Cong. Rec. 10172.]

in conference. The conferees stated (86 Cong. Rec. 10172):

> It will be observed that this amendment restricts any type of carrier from reducing its rates below an amount sufficient to cover its overhead and other elements of cost for the service rendered, including a compensatory return. This compels the carrier to charge a higher rate than is commonly imposed for carrying a great percentage of all freight by land and water in domestic commerce. The immediate effect of this amendment, if enforced, would be to compel an increase of rates on a large part of the freight now carried by ships, highway, and rails.
>
> Everywhere in the world transportation rates take into consideration the class of traffic carried and at what rate it will move. Raw materials such as grains, farm products, coal, and other heavy materials frequently move at a rate less than required by this provision. Low-profit freight compensates for its carriage, but ordinarily the carrier could not successfully continue in business on low-cost freight alone. It is the greater profit made on high-class freight that makes the maintenance of our low-cost transportation system possible.
>
> At the present time about 100 railroads are under the protection of the courts because their revenues do not meet their expenses. This proposed amendment might drive these lines out of existence if enforced against them because it would

force their rates to a higher level and would transfer the business to their competitors.

This proposed amendment, if enacted, would impose numerous administrative difficulties; for instance, establishment of a permissible rate on a given product would require the production of evidence to show from the whole income and expense accounts of the carrier what rate would be required to meet the standard of rate making this amendment would establish.

Such an amendment would place its greatest burdens on the transportation of heavy freight such as farmers' products and would cause an unwarranted increase in freight rates which would be highly detrimental to our transportation system.

Again, the express proviso in Section 305 (c) that water rates shall not be deemed discriminatory, or to involve an unfair competitive practice by reason of differences between them and rail rates, is irreconcilable with the contention that relative costs should control. Finally, the provisions of Section 307 (h) strongly imply rejection of any consideration of relative costs as between water carriers and rail carriers. That section provides for the establishment of minimum rates for contract water carriers in certain instances. The Commission is required not to set the minimum rates for any contract water carrier in a manner that will improperly prejudice or disadvantage any other *water* carrier, and the Commission is required to consider the relative costs of the

two carriers. The failure to mention rail carriers is significant as showing that Congress had no thought of governing water rates by relationships between water costs and rail costs.

Baldly stated, the relative costs argument is that rates for an inferior service must equal rates for a superior service unless the transportation costs of the inferior service are lower. In other words, a service is to be priced in total disregard of its value to the consumer; and the consumer must pay just as much for an inferior service as for a superior service, simply because there is no showing that it costs less to furnish the inferior service. The district court succinctly answered this contention (R. 178):

> And finally, plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

The fundamental principle of economics to which the court below adverted is especially important here. On the basis of the evidence in this record the Commission and the three judges of the court below concluded that to require parity of rates

would be, as the court put it, "to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service" (R. 178).

The rule that costs should constitute the controlling factor in rate making would wreak havoc with the entire existing structure of rail rates throughout the country. The decisions of this Court and the Commission have repeatedly rejected such a suggestion.[17] Appellants' reliance (Br. 35 *et seq.*) upon *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, is misplaced. This Court there held that rail carriers could not discriminate between ex-barge grain and ex-rail grain by charging higher rates for carrying the former, and that while a possible justification for differences in rates charged for these services would be a difference in transportation costs, the latter was not found by the Commission.

[17] See *New York* v. *United States,* 331 U. S. 284, 331; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359; *Louisiana Public Service Commission* v. *Texas & New Orleans R. Co.,* 284 U. S. 125, 132; *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, 510–511; *Proposed Lake Erie-Ohio River Canal,* 235 I. C. C. 753, 761; *Lighterage Cases,* 203 I. C. C. 481, 510; *West Coast Lumbermen's Assn.* v. *Akron, C. & Y. Ry. Co.,* 183 I. C. C. 191, 198–199; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.,* 159 I. C. C. 691, 696–697. And see *Federal Power Commission* v. *Hope Gas Co.,* 320 U. S. 591, 602, for a clear-cut rejection of the contention that any one factor can be controlling in rate-making.

Plainly the *Mechling* situation is not comparable to that here. There, the question was discrimination by a carrier in rates charged to two shippers for an identical service. Here, the question is whether barge lines must charge the same rates as railroads for different services. In *Mechling,* the rail carriers were attempting to discriminate against ex-barge traffic in violation of specific provisions of the Act. The only "discrimination" here arises from differences between rail rates and barge rates, and Section 305 (c), *infra,* p. 53, explicitly declares that such differences shall not constitute an unlawful discrimination.

C. *The basis of the rail carriers' attack upon the order*

Appellants treat the instant order of the Interstate Commerce Commission as though it prescribed rates for transportation by rail between certain points, and lower rates for transportation by water between the same points. The entire structure of their argument is built upon this assumption. In fact, however, the order does not alter existing all-rail rates, and the new rail-barge rates are based on existing all-rail rates. The differentials prescribed in the order are deducted from the barge division of the through rates. Hence the rates under attack are designed to and will give the rail carriers substantially the same division of rail-barge rates as they now receive from the corresponding leg of all-rail routes.

The apparent misconception of appellants as to the effect of the Commission's order is reflected in their reliance on *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282. They correctly point out that this case stands for the proposition that a carrier cannot be required to maintain unreasonably high rates for the benefit of its competitors. But the rail carriers here do not complain that they are being compelled to maintain unreasonably high rates. In fact, as has been pointed out, the order of investigation does not embrace all-rail rates and the order here challenged does not purport to pass on the reasonableness of existing all-rail rates. The order operates upon appellant rail carriers directly since it requires them to establish joint through routes with water carriers. But appellants are not contesting the order because of its effect upon the rail carriers participating in the joint rates, but because of its effect upon the rail lines with which barge lines are competitive (Railroad-Appellants' Br. 37, 52). We are dealing here with through rates which involve rail as well as barge rates, but the controversy does not concern the reasonableness of all-rail rates, or of the rail division of rail-barge rates. The real dispute, as appellants concede, is over the rates to be charged and received by their competitors, the barge lines, for the barge leg of rail-barge routes. In this respect, the issue here is the same

as that in *Mississippi Valley Barge Line Co.* v. *United States, supra,* except that here the shoe is on the other foot. There, the barge lines protested rate reductions by rail carriers because of the adverse competitive effect it would have on the barge lines' traffic. And this Court rejected the suggestion that "carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water" (292 U. S. at 288).[18]

Even if we were to assume with appellants (contrary to the findings of the Commission approved by the district court) that it has been affirmatively established that all-rail transportation costs are lower than rail-barge transportation costs, it does not follow either that the Commission violated the law in issuing this order, or that appellants have suffered any legal injury from the order. The Commission established the joint rate schedule on the premise that if the barge lines perform the service involved in the barge leg of the proposed rail-barge routes at rates based upon the prescribed differentials, the compensation received

[18] The Court implied doubt as to the standing of a competing carrier to attack a rate order not operating directly on it (292 U. S. at 289). And see *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249. In principle there is the same doubt where, as here, a carrier subject to a joint rate order attacks a part of the order which does not affect its rates directly but only the rates of a competitor. See brief for appellee barge lines, Point I.

will cover their costs and yield a return on investment (*supra*, p. 15). As the court below held (R. 178–179), the rail carriers may not be heard to demand more. If transportation conditions have changed, or should change in the future, so that the rates for the water legs of joint routes are not compensatory, any or all of the carriers here involved are free to go to the Commission for relief.

The right of a mode of transportation to have its "inherent advantages" preserved is not a right to be free from reasonable rate competition from other modes of transportation. If barge rates are set at compensatory levels, as they have been here, the remedy for the railroads in order to meet such competition would appear to be to improve their service or lower their rates, or both—and not, as appears to be the case here, to seek to compel their competitors to raise *their* rates. The Commission has not passed upon the question of what, if any, differentials would be prescribed in the event that *all-rail rates* should be lowered to equal *rail-barge costs*.[19] As the opinion of the court below points out (R. 179):

[19] That issue is not here presented. But the *power* of the Commission to permit carriers to charge rates below costs in appropriate circumstances cannot seriously be questioned in view of the legislative history of the Act showing that a provision denying such power was deleted in conference (*supra*, pp. 36–37). As an abstract proposition, it might seem anomalous for a carrier to complain of a competitor's willingness to accept a lower rate which does not compensate the latter for its operating costs.

> Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i. e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist. In the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

The Commission has in effect followed the rule that if an inferior service believes it can profitably operate at rates lower than those charged for the superior service, the inferior service should be permitted the opportunity to do so. Indeed it has recognized that only on this basis can the carrier offering the inferior service hope to survive.

This would seem a reasonable principle of rate-making even in the absence of a legislative background reflecting a clear-cut congressional intention that water transportation—the inferior service—should be preserved and developed. This Court had occasion to review that legislative background in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574–577. The Court pointed out that there was much opposition to bringing water carriers under the jurisdiction of the Interstate Commerce Commission because of the fears of the champions of water transporta-

tion that "the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation" (330 U. S. at 575). To put these fears at rest, various provisions, reviewed above, were introduced "to protect the water carrier's natural advantages" (*id.* at 576).[20] Appellants seek to convert these provisions into a guarantee against rate competition by barge lines against rail carriers.

Appellants do not quarrel with the assertion that the references in the Transportation Act of 1940 to the preservation of the "inherent advantages" of various modes of transportation were introduced into that Act at the behest of the advocates of water transportation. But appellants say that both the statute as written and its legislative history reflect an intention on the part of Congress that the administration of the Act be impartial, and that the inherent advantages of *all* types of transportation shall be preserved. With this contention we agree, but we disagree with the contention that to preserve the inherent advantages of low-cost carriers—whether rail or water—the Commission is required to compel competing carriers to maintain artificially

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[20] See 84 Cong. Rec. 5873–5876, 5883, 6131. For an extensive review of the legislative history of these provisions see the brief for the United States in the *Mechling* case (O. T. 1946, No. 72), pp. 16–26.

high rates. *Mississippi Valley Barge Line* v. *United States, supra.*

If all-rail costs are actually lower than rail-barge costs, rail carriers would presumably be able to lower their rates below those which barge lines could afford to maintain. Appellants, however, do not seek to preserve their assumed inherent advantages by such a lowering of their rates. On the contrary, their position seems to be that their asserted low-cost position entitles them to keep their rates high and at the same time be protected from lower rates of barge lines. Neither the statute nor the legislative history referred to in appellants' briefs supports such a distortion of the concept of preservation of inherent advantages.

The district court aptly stated the extent of the rail carriers' interest in the rates fixed for the barge portions of the joint routes (R. 178–179):

> So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service.

Appellants suggest (Br. 44) that the operating deficits incurred by Federal somehow constitute a refutation of the Commission's premise, ac-

cepted by the district court, that the barge division of the proposed joint rates would be sufficient to cover barge costs and yield a return upon investment. But the record does not indicate, and the Commission did not find, that the cause of Federal's deficits was either the carrying of goods generally at less than cost or the handling of interchange traffic at rates below cost. We think that an examination into the history of Federal's operations would reveal that its deficits have resulted from its pioneering developmental work in areas in which private barge lines have been reluctant to operate. But in any event it is clear that there is no basis in this record for the inference that rail-barge rates have not been compensatory. Accordingly, the suggestion that Federal's deficits have any bearing upon the validity of the Commission's order is wholly unwarranted.

II

THE ORDER DOES NOT RESULT IN UNLAWFUL OR UNCONSTITUTIONAL DISCRIMINATIONS AGAINST PARTICULAR PORTS OR SHIPPERS

The assertion that the differentials here prescribed will unlawfully discriminate against ports and shippers who are not served by barge lines is completely without substance. As the court below noted (R. 183), if the differentials are otherwise lawful (as it held them to be), "then the contention that the order prescribes unreasonably low barge-rail rates or unduly prefers New Orleans

over Savannah and the Texas ports becomes, in effect, a complaint against any rate structure which provides to shippers who are in a position to transport their goods by water, rates which are lower than those available to shippers who are not so located." It is settled law that geographical advantages do not constitute an undue preference, nor is the Commission required to equalize them. In the leading case of *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46, this Court, speaking through Mr. Justice Holmes, said, "The law does not attempt to equalize fortune, opportunities or abilities."

The constitutional argument is likewise without merit. Article I, Section 9, Clause 6 of the Constitution provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another * * *." As this Court pointed out in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 131:

> The clause of the Constitution invoked is: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and

> clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States.

Plainly, the rate differentials here do not prefer the ports of one state over another. If there is a preference here it is in favor of ports on inland waterways irrespective of in what state they happen to be located. In any event, as the district court noted (R. 184), "in this case, the preference of which the intervenors complain is not given by a regulation of commerce but by a favorable geographic location."

The Commission, in weighing the many relevant factors in rate-making, may of course consider the effects of changes in the rate structure upon localities and shippers. In the instant cases it did so. Thus, for example, the Commission noted that the "barge-and-rail rates on sugar have a vital relation to the general competitive relationships on sugar from all producing points to mid-western consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here" (R. 49). Again, the Commission included in its findings (R. 52) a proviso that rail-barge commodity rates should not be required to be established

"from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans." And in its supplemental report the Commission broadened this proviso to apply to rates to New Orleans as a destination (R. 76).

Appellants ask this Court to substitute its judgment as to the relative weight to be attributed to various factors for the judgment of the Commission. It is a familiar rule that this Court will not assume such a function. As was stated in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536:

> The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that

has support in the record and the applicable law.

The Commission's judgment in the instant cases is fully supported by the record and the applicable law.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted.

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OCTOBER 1950.

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [49 U. S. C. preceding 1.]

* * * * *

SEC. 305. (c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act. [49 U. S. C. 905 (c).]

* * * * *

SEC. 307. (d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or

maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. [49 U. S. C. 907 (d).]

* * * * *

(f) In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient

water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. [49 U. S. C. 907 (f).]

* * * * *

(h) Whenever, after hearing, upon complaint or its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by water, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by water subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts

complained of and the reasons for such complaint and shall be made under oath. [49 U. S. C. 907 (h).]

Section 3 (c) of the Inland Waterways Corporation Act, as amended by the Act of May 29, 1928 (Denison Act), 45 Stat. 978, provides as follows:

> (c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage, in common-carrier service on such rivers. [49 U. S. C. 153 (c).]